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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 117

HUNTER A. GIBBES, REPRESENTING HIMSELF AND ALL OTHER DEPOSITORS OF THE CENTRAL UNION BANK OF SOUTH CAROLINA, ETC., APPELLANT,

vs.

SIMPSON J. ZIMMERMAN, INDIVIDUALLY AND AS CONSERVATOR OF THE CENTRAL UNION BANK OF SOUTH CAROLINA, ET AL., APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM.

Appellant respectfully submits the following in opposition to the motion to affirm herein:

I.

Police power cannot justify the passage of a law or ordinance which runs contrary to the limitations of the Federal Constitution.

Buchanan v. *Warley*, 245 U. S. 60, 74, 62 L. Ed. 160.

6 *R. C. L.*, pp. 191-2, § 190; pp. 195-6, § 193; pp. 198-9, §§ 194-5.

6 *R. C. L.*, Permanent Supp., pp. 1647-9.

State v. *Moore*, 10 S. E. 144, 17 A. S. R. 696.

II.

Contractual and property rights of appellant are impaired and taken by the Act of the General Assembly of South Carolina in question in this appeal in violation of the provisions of the United States Constitution, Art. I, Sec. 10.

1. *Contractual Right.*—Article IX, Sec. 18, of the Constitution of South Carolina of 1895, provides:

> Liability of Stockholders—In Banks.—The stockholders of all insolvent corporations shall be individually liable to the creditors thereof only to the extent of the amount remaining due to the corporation upon the stock owned by them: *Provided*, That stockholders in banks or banking institutions shall be liable to depositors therein in a sum equal in amount to their stock over and above the face value of the same.

Vol. III, Code of 1932, Sec. 7868 (which is but a re-enactment of a statute which has been in existence for many years) provides:

> **Liability of Stockholders of Insolvent Banks.**—The stockholders of all insolvent banks and banking institutions, whether heretofore or hereafter incorporated under the Act of Assembly of this State, either general or special, shall be individually liable to the creditors thereof, other than depositors, only to the extent of the amount remaining due to the corporation upon the stock owned by them: *Provided*, That stockholders in all such banks and banking institutions shall be liable to the depositors therein in a sum equal in amount to their stock over and above the face value of the same.

This liability of the stockholders is contractual in its nature, arises at the time of the subscription and is for the benefit of the depositors.

Fisher v. *Chisholm*, 159 S. C. 395, 398, 157 S. E. 139 (2).

The right to enforce the double liability of the stockholders for the benefit of the depositors is by means of a suit in equity and a receiver, the remedy which the appellant was seeking to enforce.

Branchville Motor Co. v. *Adden*, 158 S. C. 90, 94-5, 155 S. E. 277 (3), and cases cited.

In the case at bar the depositor, appellant, on March 4, 1933, at which time he made or had his deposit in the bank, had the right, and the remedy by receivership to enforce it, just above mentioned.

The Act of March 9, 1933, set forth and attached to the petition for the writ of prohibition, as the same is administered and enforced by the Governor and his

Banking Board and construed and interpreted by the decision of the Supreme Court of the State of South Carolina from which this appeal is taken, prohibits the appellant from enforcing this right and takes away from him this remedy which is a vital portion of his contract, thus violating the provisions of the United States Constitution.

Re Fidelity State Bank, 209 Pac. (Idaho) 447, 31 A. L. R. 781, etc.

6 *R. C. L.* 355, etc.

2 *R. C. L.*, Supp. 100.

4 *R. C. L.*, Supp. 407.

Sterling v. *Constantin* (Adv. Ops.), 77 L. Ed. 262, 264, 265.

U. S. C. A., Const., Art. 1, Sec. 10, Part 2, pp. 42-3, and cases. Also notes at pp. 503, 505, 507.

III.

The right of appellant in the assets of the Bank (admittedly insolvent) and to have them administered through a receivership, is taken without due process by the Act of the General Assembly of South Carolina of March 9, 1933, as administered by the Governor and his Banking Board, and as interpreted by the decision from which this appeal is taken.

In the case at bar, as shown by the complaint in the original action in the Court of Common Pleas for Richland County (R. 16), admitted by the demurrer therein and also by the complaint in the petition for the writ of prohibition in the Supreme Court of the State of South Carolina, the Governor, acting under the plenary

powers attempted to be conveyed by the Act of March 9, 1933, has arbitrarily appointed Mr. Zimmerman, Vice president, a director and stockholder of the bank, and has placed him in charge of the bank, and of its assets and property, and he is proceeding to conduct a banking business based upon these assets and property; and we respectfully submit:

1. *The assets and property of the bank belong to its creditors, of whom the appellant, as a depositor, is one.*

Rice et al. v. *City of Columbia et al.*, 143 S. C. (1927) 516, 539, 141 S. E. 705 (2).

Livingstain v. *Banking Co.*, 77 S. C. (1907) 305, 310, 57 S. E. 182, 22 L. R. A. (N. S.) 442, 122 Am. St. Rep. 568.

Peurifoy, Receiver, v. *Cambell, Receiver,* 145 S. C. (1928) 1, 7, 142 S. E. 788 (1).

U. S. v. *Butterworth, etc., Corp.*, 269 U. S. 504 (2), 70 L. Ed. 380, 383.

Coriell v. *Morris White, Inc.*, 54 F. (2d) (C. C. A., N. Y.) 260.

2. *These property rights can only be enforced and protected through a receivership by the courts.*

Cases cited just above, and especially

Blanchville Motor Co. v. *Addens, supra.*

Parker v. *Bank*, 53 S. C. 583, 31 S. E. 673, 674.

In addition to these authorities we have an express statutory enactment passed in 1929, Code 1932, Vol. III, Sec. 7855, Sub-section (6), which makes a receivership essential in enforcing the stockholders' liability, and which reads as follows:

(6) Stockholder's Liability.—Any receiver appointed to liquidate the assets of any closed State bank shall, under the authority of this section when it is necessary to collect the liability of stockholders, have full power and authority to demand of such stockholders the statutory liability, provided for in section 7868, and upon failure of any stockholder to pay into his hands such liability, he is hereby invested with full power and authority to bring suit, either individually or collectively, against such stockholder, or stockholders, for the collection of such liability, and all funds received from said assessment by payment with or without suit shall be kept as a separate fund to be paid to the depositors solely. Said receiver shall receive as compensation for the collection of the stockholders' liability, two and one-half (2½) per cent and in case same is placed in the hands of the attorney for collection by suit, or otherwise, an additional five per cent may be paid to the attorney for his services, or so much as the court may decide the attorney is entitled to.

3. *Fitness of Receiver.*—It will be observed by the Court that the depositors and the creditors have no voice in the selection of a receiver and/or in passing upon his qualifications. In the instant case he is named arbitrarily by the Governor, who has selected a man who is vice-president of the bank, and who is a director and a stockholder.

A receiver should be entirely impartial, as well as competent.

Virginia-Carolina Company v. *Hunter*, 84 S. C. (1909) 214, 224, 66 S. E. 177 (3).

Ex Parte Citizens Exchange Bk., 140 S. C. (1927) 471, 494, 139 S. E. 135 (11) and cases cited.

The rule in South Carolina would exclude the appointment of an officer of the bank as in the present case and is thus expressed in both of the above entitled cases:

> The practice of making such appointments (an officer of the corporation) has been disapproved, however, and the courts have refused to designate such persons as receivers, unless the case is exceptional and urgent and the parties interested consent thereto, since receivers should be impartial between the parties in interest, and have held them to be improper persons to be appointed; but often this attitude of the courts against the appointment of such persons as receivers is affected by the consideration of other circumstances, such as the connection of the person proposed with the misfortune of the company.

The statutory law of the State of South Carolina, as embodied in Vol. III, Code of 1932, Sec. 7855, contains the following:

> "Provided, that in appointing a receiver or liquidating agent as provided in this section, no officer, director, or attorney who was connected or associated with said bank at the time it was closed or taken over by the bank examiner, or who, within two years prior to that time had been an officer, director or attorney, shall be named as receiver of said bank."

If Mr. Zimmerman acts in behalf of the creditors he must enforce the liability of the stockholders, one of whom he is. The acts of the Board of Directors and of the officers are likely to come in question and he would thus be in a most awkward position to protect the interest of the creditors. If the Court were appointing a receiver, he would be disqualified because it is certainly the duty of the Court to appoint an impartial person, as has been repeatedly said.

For the foregoing reasons, we respectfully submit that the motion to affirm should be denied and that the Act of the General Assembly of the State of South Carolina, as administered by the Governor and his Banking Board, and as interpreted in the decision from which we appeal, should be declared null and void as impairing the obligation of the contract of the appellant, depositor, and as taking his property without due process.

Respectfully submitted,

D. W. Robinson,
Attorney for Appellant Hunter A. Gibbes.

June 24, 1933.

Service of the foregoing brief in opposition to motion to affirm the judgment of the Supreme Court of the State of South Carolina in the foregoing case is hereby acknowledged and a copy thereof retained this the 22nd day of June, 1933, at Columbia, S. C.

Melton & Belser,
Attorneys for Appellees.